Court in *Equitable Savings & Loan v. Department of Revenue*[12] reviewed this issue as it applies to regulations promulgated under Or. Rev. Stat. §314.280, which includes Or. Admin. R. 150-314.280-(M), the retroactive regulation at issue in *U.S. Bancorp*. For purposes of defining a legislative versus an interpretative regulation, the Oregon Tax Court cited an Administrative Law Treatise which describes a legislative rule [regulation] as valid and binding on the court as a statute if the regulation satisfies three requirements: (1) within the granted power; (2) pursuant to proper procedure; and (3) reasonable.[13] The Treatise goes on to define an interpretative regulation as having the force of law depending on the existence of certain enumerated factors, not at issue in this case.[14] In explaining the difference between the two types of regulations, the Oregon Tax Court stated, in relevant part:

> It is difficult to grasp the difference between interpretive and legislative regulations but it appears that some statutes convey to the administrative body direct orders or permission to define or implement a portion of the statute, whereas other regulations draw no direct sanction from the statute but rather are permitted under general administrative law precepts to aid others in

---

[12] *Equitable Savings & Loan v. Department of Revenue*, 8 OTR 661 (1974), aff'd 272 Or. 457 (1975).

[13] *Equitable Savings & Loan v. Department of Revenue*, 8 OTR 661, 672-673 (1974), aff'd 272 Or. 457 (1975).

[14] *Equitable Savings & Loan v. Department of Revenue*, 8 OTR 661, 672-673 (1974), aff'd 272 Or. 457 (1975). The relevant factors for determining whether an interpretative regulation has the force of law include: (1) the court's agreeing with the rule; (2) the extent to which the subject matter with within the special administrative competence of the rule-making body and beyond judicial competence; (3) whether the rule is a contemporaneous construction; (4) whether the rule is of long standing; and (5) whether the statute has been reenacted by legislators who know of the content of the rule.

> understanding the administrative body's separate interpretation of the meaning of the statute. The regulations under the former type of statute appear legislative and the latter interpretive.[15]

The Oregon Tax Court in *Equitable Savings & Loan* ultimately concluded that because the operative statute, Or. Rev. Stat. §314.280 provides, in relevant part: "'the department shall have the power to permit or require . . . . under rules and regulations adopted by the department,'" in this case "it is relatively clear that the statute [Or. Rev. Stat. §314.280] sanctions legislative regulations."[16] The Oregon Tax Court proceeded with its analysis in *Equitable Savings & Loan* under the assumption that the regulations enacted under ORS 314.280 were legislative regulations. Based on this analysis, Or. Admin. R. 150-314.280-(M) is properly characterized as a legislative, rather than an interpretive, regulation.

B. Under any Due Process Clause standard, Or. Admin. R. 150-314.280-(M) should be held unconstitutional as applied to U.S. Bancorp.

In *United States v. Carlton*,[17] the United States Supreme Court confirmed the application of the legitimate legislative purpose test announced in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*[18] to Due Process Clause challenges

---

[15] *Equitable Savings & Loan v. Department of Revenue*, 8 OTR 673 (1974), aff'd 272 Or. 457 (1975).

[16] *Equitable Savings & Loan v. Department of Revenue*, 8 OTR 661, 674 (1974), aff'd 272 Or. 457 (1975).

[17] *United States v. Carlton*, 512 U.S. 26 (1994).

[18] *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The Supreme Court laid the foundation for the legislative purpose test in *Usery v. Turner Elkhorn Mining Co.*, 42 U.S. 1 (1976) decided seven years prior to this case; however, *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.* decision represents a clearer application of the standard.

to retroactive tax legislation. That said, as set forth below, the Court's analysis leaves serious questions about the nature of the test to be applied.

Carlton involved a constitutional challenge to a 1987 amendment to IRC §2057 that applied to transactions completed in 1986. The 1987 amendment disallowed an estate tax deduction for proceeds derived from the sale of securities to an employee stock ownership plan, where the decedent did not own the stock immediately before death.[19] Prior to amendment, at the time of the sale in question, IRC §2057 provided for a deduction on the estate tax return, regardless of the fact that the decedent did not own such securities immediately prior to dying. Hence, the retroactive application of the 1987 amendment resulted in the assessment of additional tax on the decedent's estate tax return.

The Supreme Court, in evaluating the Due Process Clause challenge brought against the 1987 amendment, noted its two principal reasons for holding the retroactive application was constitutional. The Supreme Court stated, in relevant part:

> First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created significant and unanticipated revenue loss. There is no plausible contention that Congress acted with improper motive. . . We cannot say that its decision was unreasonable.[20]
>
> Second, Congress acted promptly and established only a modest period of retroactivity.[21]

---

[19] *United States v. Carlton*, 512 U.S. 26 (1994).

[20] *United States v. Carlton*, 512 U.S. 26, 29-30 (1994). The Supreme Court has stated that the illegitimate and arbitrary standard does not differ from the harsh and oppressive test announced in *Welch v. Henry*, 305 U.S. 134 (1938).

[21] *United States v. Carlton*, 512 U.S. 26, 29 (1994).

Given this language, the Supreme Court gave express consideration to the legitimate legislative purpose test from *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, but clearly went further by addressing elements of the harsh and oppressive test announced in *Welch v. Henry*.[22] The Court departed from the legitimate legislative purpose test by giving substantial consideration to the interval between the enactment of the original provision and the 1987 amendment and the length of the period of retroactivity. The end result is that state courts and taxpayers are uncertain as to the proper test to apply, which has led to confusion and inconsistency in lower court application. Without clearer guidance, state courts will continue to reach different conclusions on similar retroactive impositions. For purposes of the present case, however, the decision of the Oregon Supreme Court is incorrect whether either of the *Carlton* standards is applied.

Under the legitimate legislative purpose test announced in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, there must be a legitimate legislative purpose furthered by a rational means to support the imposition of a retroactive tax statute.[23] The legitimate legislative purpose test allows courts to select any rational legislative purpose for which the retroactive tax statute might have been enacted and indicates that the true subjective intent of the legislature is irrelevant for purposes of the test.[24] One possible legislative purpose for

---

[22] *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *Welch v. Henry*, 305 U.S. 134 (1938).

[23] *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The Supreme Court laid the foundation for the legislative purpose test in *Usery v. Turner Elkhorn Mining Co.*, 42 U.S. 1 (1976) decided seven years prior to this case; however, *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.* decision represents a clearer application of the standard.

[24] Gray, Heather Lynn. *Carlton v. United States: An Analysis of Retroactive Tax Legislation*, 24 Stetson L. Rev. 765, 782-783 (Summer, 1995)

amending Or. Admin. R. 150-314.280-(M) is to spur state revenue growth by increasing the tax base through the inclusion of intangibles in the property factor of the Oregon apportionment formula for financial institutions.

However, the crucial issue here is whether the legitimate purpose is furthered by a rational means, in particular the retroactive application of Or. Admin. R. 150-314.280-(M) to U.S. Bancorp. It is generally accepted that a short and modest period of retroactivity for tax statutes is constitutional as necessary for the effective implementation of national legislation.[25] Under the facts of this case, however, Oregon seeks to impose Or. Admin. R. 150-314.280-(M) to U.S. Bancorp using an eight year period of retroactivity. Based on existing case law, the Supreme Court has never upheld, as constitutionally permissible, retroactive tax legislation with an eight year period of retroactivity.[26] Given this precedent, the Supreme Court under the legitimate legislative purpose test should invalidate the retroactive application of Or. Admin. R. 150-314.280-(M) as applied to U.S. Bancorp due to its patently excessive retroactivity period.

Under the harsh and oppressive test announced in *Welch v. Henry*, it is necessary to evaluate the nature of the tax and the circumstances in which it is laid.[27] The nature of the tax focuses on whether the tax imposed by the statute is a wholly

---

discussing Justice O'Connor's concurrence in *United States v. Carlton*, 512 U.S. 26, 36-37 (1994).

[25] *United States v. Carlton*, 512 U.S. 26, 32-33 (1994) quoting *United States v. Darusmont et ux.*, 449 U.S. 292, 296-297 (1981).

[26] Even in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), where the Supreme Court upheld the retroactive application of economic legislation, though not tax legislation, the retroactivity period sustained by the Supreme Court was only six years.

[27] *Welch v. Henry*, 305 U.S. 134, 147 (1938).

new tax or merely a change in the rate of an existing tax.[28] The tax sought to be imposed retroactively in *U.S. Bancorp* is the existing Oregon income tax; however, the new inclusion of intangible property in the property factor of the Oregon apportionment formula can arguably be considered a tax on a new item, albeit not a new tax, lending less support to its sustainability as a constitutional retroactive tax. The circumstances prong focuses on the taxpayer's notice of the impending law change and a temporal element.[29] The timing element refers to both the interval between enactment of the original provision and the retroactive amendment and the period of retroactivity. U.S. Bancorp seeks to have the original provision applied to its 1988-1992 tax years. The original provision existed in 1987 and it was not changed until 1995, eight years later. Hence, U.S. Bancorp as a taxpayer during the 1988-1992 tax years did not have actual or constructive notice of the impending change. In addition, the period of retroactivity is eight years long, a substantial departure from a modest period of retroactivity suggested by the Supreme Court. Given these facts, the Supreme Court should strike down the retroactive application of Or. Admin. R. 150-314.280-(M) to U.S. Bancorp as unconstitutional under the harsh and oppressive test.

Under the facts presented in *U.S. Bancorp*, both the legitimate legislative purpose test and the harsh and oppressive test support the same result, namely the invalidation of the retroactive application of Or. Admin. R. 150-314.280-(M) to U.S. Bancorp. Hence, the Supreme Court should grant certiorari to remedy the Oregon Supreme Court's erroneous and impermissible interpretation of the Due Process Clause standard and to announce a uniform standard for analyzing retroactive tax laws.

---

[28] Gray, Heather Lynn. *Carlton v. United States: An Analysis of Retroactive Tax Legislation*, 24 Stetson L. Rev. 765, 782-783 (Summer, 1995).

[29] *Welch v. Henry*, 305 U.S. 134, 148-150 (1938).

CONCLUSION

For the reasons stated above, COST respectfully requests the United States Supreme Court to accept this case for review.

Respectfully submitted,

STEPHEN P.B. KRANZ *
Tax Counsel
DOUGLAS L. LINDHOLM, President
DIANN L. SMITH, General Counsel
WILLIAM D. PELTZ, Co-Chair
BOBBY L. BURGNER, Co-Chair
J. HUGH MCKINNON, Counsel
LAWYERS' COORDINATING
SUBCOMMITTEE
COUNCIL ON STATE TAXATION
122 C St., N.W., Suite 330
Washington, D.C. 20001
(202) 484-5221

* Counsel of Record